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80-2176

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

ROBERT C. HAGOPIAN,
PETITIONER,

v.

CLAYTON W. TREFRY, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether the petitioner's discharge as Town Manager of the Town of Saugus deprived him of a property interest protected by the Due Process Clause of the Fourteenth Amendment?

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No. - .

In the
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OCTOBER TERM, 1980.

ROBERT C. HAGOPIAN,
PETITIONER,

v.

CLAYTON W. TREFRY, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Robert C. Hagopian hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.[1]

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[1] Other parties to the proceedings before the Court of Appeals were defendants David A. Dwyer, Benjamin A. MacGlashin, and Christie Serino.

Opinion Below.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1a-4a) is reported at 639 F.2d 52.[2]

Jurisdiction.

The judgment of the Court of Appeals was entered on February 3, 1981 (Appendix E, *infra*, p. 9a). A petition for rehearing was denied on March 23, 1981 (Appendix F, *infra*, pp. 10a-11a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision and Statute Involved.

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law . . ..

Massachusetts Statute 1947, c. 17 — The Charter of the Town of Saugus — provides in relevant part:

> *Section 8. Appointment of Town Manager.* The selectmen elected as provided herein shall appoint, as soon as practicable, for a term of five years, a town manager who shall be a person especially fitted by education, training and experience to perform the duties of the office. . . .
>
> . . . . . .

---

[2] Please note that the Court of Appeals misspells Clayton W. Trefry's name in said opinion and other papers — it is misspelled as Clayton W. *Trefrey*.

Section 11. Removal of Manager. The selectmen, by majority vote of the full membership of the board, may remove the town manager. At least thirty days before such proposed removal shall become effective, the selectmen shall file a preliminary written resolution with the town clerk setting forth in detail the specific reasons for his proposed removal, a copy of which resolution shall be delivered to the town manager. The manager may reply in writing to the resolution and may request a public hearing. If the manager so requests, the board of selectmen shall hold a public hearing, not earlier than twenty days nor later than thirty days after the filing of such request. After such public hearing, if any, otherwise at the expiration of thirty days following the filing of the preliminary resolution, and after full consideration, the selectmen by a majority vote of the full membership of the board may adopt a final resolution of removal. In the preliminary resolution, the selectmen may suspend the manager from duty, but shall in any case cause to be paid to him forthwith any unpaid balance of his salary and his salary for the next three calendar months following the filing of the preliminary resolution.

Statement of the Case.

This civil rights action was brought pursuant to § 1983 of Title 42 of the United States Code. Petitioner Robert C. Hagopian commenced this action in the United States District Court of Massachusetts, alleging that the defendants violated his Fourteenth Amendment right to due process in dismissing him from employment as the Town Manager of the Town of Saugus.

Subsequently, defendants moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief could be granted. On September 16, 1976, the motion was denied by the District Court. In February, 1980, the action was tried before a jury. On April 29, 1980, judgment on a jury verdict for petitioner was entered against all defendants in the amount of twenty-five thousand dollars ($25,000.00); punitive damages were also awarded in the amount of one thousand dollars ($1,000.00) against three defendants, and in the amount of two thousand dollars ($2,000.00) against defendant Clayton W. Trefry (Appendix C, *infra*, pp. 6a-7a). After the denial of their motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, defendants appealed the judgment of the District Court to the First Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The judgment of the District Court was reversed pursuant to opinion and judgment rendered by the Court of Appeals on February 3, 1981 (Appendix A, *infra*, pp. 1a-4a, and Appendix E, *infra*, p. 9a). Judgment of Dismissal was subsequently entered by the District Court on April 2, 1981 (Appendix G, *infra*, p. 12a).

Robert C. Hagopian was appointed as Town Manager for the Town of Saugus in January, 1974 for a term of 5 years in accordance with Chapter 17 of the Town Charter. Eight months later the Board of Selectmen voted to remove him from office and to suspend him pending final determination of the resolution. The petitioner was notified of this vote and received the following explanation:

> 1. The Board of Selectmen lack confidence in Robert C. Hagopian as Town Manager.
> 2. The Board of Selectmen believe that Robert C. Hagopian's performance as Town Manager has been unsatisfactory in that he has:

Failed to demonstrate a clear pattern of leadership for the town as required by Chapter 17.

. . .

Failed to communicate effectively with the Board of Selectmen and with the Town Meeting on matters important to the future of the Town.

. . .

Consistently proven to be uninformed or misinformed on the status of programs such as the two (2) million dollar sewer program currently underway.

Thereupon, the petitioner requested the public hearing to which he was entitled by statute, requested further particulars as to the specific reasons for his dismissal (as required by statute), and requested that certain town officials and documents be available at the public hearing. The Board did not respond other than scheduling a public hearing for November 1, 1974. At the "hearing," petitioner asked to question the Selectmen as to the reasons for his dismissal, but was refused. He requested that witnesses be sworn, including himself, but was refused. At no time was any evidence given at that hearing in the petitioner's presence.

In his District Court complaint, petitioner specifically objected to the Board's failure to identify further the grounds for his removal, its failure to allow him to cross-examine Board members under oath at the public hearing, and its decision to dismiss him "without any justifiable cause or basis in fact."

In reversing the jury verdict in favor of petitioner, the First Circuit Court of Appeals held that:

1) under the Saugus Town Charter, Town Managers can be dismissed without cause;

2) under Massachusetts law a mere requirement that reasons be stated does not mean they must be sufficient to constitute legal cause or even that they be true;

3) that petitioner therefore had no property interest at stake;

4) that the hearing to which petitioner was statutorily entitled had a "limited purpose" and thus there was no constitutional right in how it was conducted. (Appendix A, *infra*, pp. 3a-4a).

Reasons for Granting the Writ.

1. The Court of Appeals determined that the petitioner was not deprived of a "property interest," and therefore did not reach the question of whether the process he received was adequate. Petitioner agrees that under *Bishop* v. *Wood*, 426 U.S. 341 (1976), his claim of "property" in his employment must be determined by reference to state law. *Bishop, supra* at 344. However, in this case, as in *Bishop*, there is no authoritative state court interpretation of the ordinance involved. Hence, as in *Bishop*, the question is whether the District Court's view of state law is tenable. Petitioner contends that it is not for the following reasons.[3]

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[3] It is further respectfully submitted that this Court should accord the same deference to the two District Court judges who considered this issue on the motion to dismiss and the motion for directed verdict, that the Supreme Court accorded the trial judge in *Bishop* v. *Wood, supra*, 341, 345. Like the trial judge in *Bishop*, both the District Court judges, who previously determined that the petitioner had a constitutionally protected interest under the provisions of the Saugus Town Charter, practiced law in the Commonwealth of Massachusetts for many years. In addition, they also served as distinguished judges in the Massachusetts Superior Court. Their interpretation of Massachusetts law, based upon *Bishop, supra*, should be accorded great weight by this Court.

The Court of Appeals relied on the decision of a lower Massachusetts court in holding that: "Under Massachusetts law a mere requirement that reasons be stated does not mean they must be sufficient to constitute legal cause, or even that they be true" (Appendix A, *infra*, p. 3a, citing *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. 991, 993, 404 N.E.2d 675, 676-77 (1980)). Petitioner calls to this Court's attention the case of *McKenna* v. *White*, 287 Mass. 495, 192 N.E. 84 (1934), in which the Supreme Judicial Court of Massachusetts distinguished between "cause" and "reasons," as follows:

> The two words are often used in a similar sense. There is a difference in meaning between them in application to removal from office or employment. Cause occasions the removal. It is a succinct statement of that which produces or leads to removal as the result. Reason or reasons are the circumstances, the proofs, the facts or the motives, which generate the conviction that there ought to be removal. A statement of the reasons or reasons for removal is a *full and fair answer* to the question why was the removal made. *The statement of a cause may be in general terms. A statement of the reason or reasons must be somewhat definite and detailed.* . . . A statement of the reason or reasons leading to the removal of another from office explores the mind and searches the conscience more deeply than the statement of the cause. . . . (Emphasis added.)

The Court went on to hold:

> The manifest purpose of the provision that a removal from an appointive office be accompanied by written statement of the reason or reasons therefor . . . is to

> impose the restraint upon unwarranted, prejudiced or wrongful removals naturally flowing from immediate, *complete* and permanent publicity of the *true grounds and motives underlying that action*, and to enable the removed officer or employee to know why he has been deemed unworthy to continue longer in the public service. . . .

McKenna, supra, 184 Mass. at 498, 192 N.E. at 85 (emphasis added).

Thus from *McKenna* it is apparent that the reasons given for removing a public official must represent the *true* grounds for removal. Accordingly, those reasons may not be false, as held by *Fabrizio* and by the Court of Appeals in the case at bar. It is also apparent that the reasons must be definite and detailed, not general and conclusory as in the instant case. As *McKenna* makes clear, a requirement that reasons be given for dismissal is an even *stricter* requirement than that of cause.

2. In holding that town managers can be dismissed without cause, petitioner respectfully submits that the Court of Appeals misapplied Massachusetts law. That Court based its holding on a series of cases involving summary removal statutes, none of which involved the requirements of prior notice and a hearing prior to final dismissal.

First, petitioner submits that the Court of Appeals' reliance on *Fabrizio, supra*, is misplaced in the following particulars. The statute there in question provided that a mayor "'may remove the head of a department or member of a board by filing a written statement with the city clerk setting forth in detail the specific reasons therefor.'" That statute further provided that a copy of the statement was to be given to the person removed, "'who may make a written reply, which, if he desires, may be filed with the city clerk; but such reply *shall not affect the action taken unless the mayor so determines.*'"

Fabrizio, supra, Mass. App. Ct. Adv. Sh. at 992 and n.2, 404 N.E.2d at 676 and n.2 (emphasis added). Clearly this statute provides for removal at pleasure, in contrast to the statute in the case at bar.

Second, *Fabrizio* relied heavily on *O'Dowd* v. *Boston,* 149 Mass. 443, 21 N.E. 949 (1889), which also interpreted the meaning of a removal statute which required neither prior notice nor a hearing. The language quoted by the Court of Appeals in the case at bar — "With or without a hearing, there is a record of the cause of removal, and the appeal in either case is to public opinion" (Appendix A, *infra,* p. 3a) — simply meant (in the context of *O'Dowd*) that where removal is at pleasure, a non-mandatory hearing would be superfluous since it could not possibly change the outcome. As the *O'Dowd* Court stated, "The language of the statute indicates that it did not intend to require charges and a hearing." *O'Dowd, supra,* 149 Mass. at 445, 21 N.E. at 950. *Ayers* v. *Hatch,* 175 Mass. 489, 56 N.E. 612 (1900), also interpreted a removal statute similar to those in *O'Dowd* and *Fabrizio.* It allowed removal by the mayor "'for such cause as he shall deem sufficient and shall assign in his order of removal, and the removal shall take effect upon the filing of the order therefor in the office of the city clerk . . ..'" *Ayers, supra,* 175 Mass. at 491, 56 N.E. at 613. That statute did not require notice or a hearing. The *Ayers* Court reasoned that if removal be for cause, it "repels the idea of removal at pleasure, even though the sufficiency of the cause is for [the Mayor] to decide." *Ayers* went on to hold:

> *Cause implies,* we think, *a reasonable ground of removal,* and *not a frivolous or wholly unsatisfactory or incompetent ground* of removal. If the cause assigned is a reasonable one, then, whether, under the circumstances, it is sufficient to justify a removal, is for the mayor to

> decide, and his decision is final. But whether the cause assigned constitutes, of itself, as matter of law, ground for removal, is a question for this court to determine. . . .

Ayers, supra, 175 Mass. at 492, 56 N.E. at 613 (emphasis added).

These cases do not stand for the proposition that the word "cause" must itself appear in a removal statute in order to create a property right. Nor do they stand for the proposition that other statutory provisions (*e.g.*, as here, provisions for prior notice of the grounds of removal followed by a hearing unlimited in scope) may not imply removal for "cause." Surely these requirements "repel the idea of removal at pleasure." *Ayers, supra.* At most, these cases support the Court of Appeals' contention that "Under Massachusetts law the *mere* requirement that reasons be *stated* does not mean they must be sufficient to constitute legal cause" (Appendix A, *infra*, p. 3a, emphasis added), hardly the circumstance in the case at bar.

3. A plain reading of the relevant statutory language (the Town Charter) clearly indicates that a Town Manager cannot be summarily dismissed at the pleasure of the Board of Selectmen. In *O'Dowd, Ayers* and *Fabrizio, supra*, no hearing was either required or allowed, and the filing of an order of removal completed the process. By contrast, the removal procedure under the Saugus Town Charter is designedly not summary. The statute itself requires that at least "thirty days before [the] *proposed* removal shall become effective, the selectmen shall file a *preliminary* written resolution . . . setting forth in detail the specific reasons for his *proposed* removal" (emphasis added; see text, *supra*, at p. 3). If the Town Manager requests a hearing, he may not be removed unless and until a majority of the full membership of the Board of Selectmen, *after* full consideration, adopts a *final* resolution of removal. Further, by the use of the word *shall*, Section 11 of the Charter

creates an absolute right to a public hearing as a condition precedent to final removal. *Tucker* v. *City of Boston*, 223 Mass. 478, 112 N.E. 90 (1916).

4. The Court of Appeals' holding that the hearing provided by statute has a limited purpose, and thus there is no constitutional right in how it is conducted, is without foundation in law and leads to absurd results. Where there is a statutory right to a hearing, the hearing must have a purpose and significance. *McCarthy* v. *Emerson*, 202 Mass. 352, 88 N.E. 668 (1909). In *McCarthy*, under a statute similar to that in the case at bar, the Court held that the petitioner did not receive the hearing required by that statute. The Court stated, "If the statute before us had provided simply that the employee . . . sought to be removed should first have an opportunity to give an explanation of his conduct, a different question would be presented." *McCarthy*, *supra*, 202 Mass. at 354, 88 N.E. at 669. Similarly, there is no such provision in the statute in question in this case.

In addition, neither of the "limited" purposes which the Court of Appeals alleges were served by petitioner's hearing were served in this case. First, a purpose to allow "an articulated and facially invalid reason such as racial discrimination to be quickly identified" (Appendix A, *infra*, p. 4a), had already been served by the requirement of prior notice of reasons for removal. Second, the purpose of giving employees "an opportunity, should they feel that the reasons proffered were unsupported or not the real reasons, to put their case to the public via a hearing" was not served in this case (Appendix A, *infra*, p. 4a). Manifestly, there was no way for petitioner to determine what the real reasons were, since he was denied all opportunity to question defendants as to those reasons. The view of the Court of Appeals is thus tenable only if it is presumed that the drafters of the statute intended the hearing to be meaningless.

5. The Court of Appeals' opinion ignores the import of petitioner's five- (5) year term and in effect treats such term as a nullity. Such term was specifically included in the statute and was also incorporated in petitioner's contract of employment. It must also be presumed that this statutory provision had some meaning. In this connection, petitioner notes that whether a property interest exists is not *solely* a question of state law. There is certainly a federal dimension to the definition of "property" in the Federal Constitution. This Court in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), held that property interests can arise from "existing rules or understandings" that derive from "an independent source *such* as state law." *Board of Regents, supra*, at 577 (emphasis added). Thus other factors in addition to state law must be considered, including the plain wording of the statute and the reasonable expectation of the employee.

Ironically, in *Board of Regents* v. *Roth, supra*, the issue was whether the petitioner had a property interest in his reemployment which required that a statement of reasons be given and a hearing be held. There, the term of his contract was one academic year and the Court found that he had no property interest after that term expired. Here, there is already a statutory requirement for a statement of reasons and a hearing, together with a five-year term of employment. Yet the Court of Appeals determined that no property interest was at stake so as to require a hearing. It is submitted that the Court of Appeals was forced to engage in circular reasoning to avoid finding a property interest since "due process" requirements were already written into the statute. Thus the relevant inquiry is whether the procedural safeguards *themselves* furnish the basis for a property interest so as to invoke due process. It was held that they *do* in *Himmelbrand* v. *Harrison*, 484 F.Supp. 803 (1980). There, citing *Roth*, the Court held:

> By its own terms, the statute offers [employees] more than a "unilateral expectation" that their employment will not be arbitrarily terminated . . .. It gives [employees] a "legitimate claim of entitlement to continued employment" at least to the extent that it furnishes insurance against arbitrary employment actions. The Court holds that the . . . Procedural Guarantees set out in [the statute] provided [the employee] with a property interest in his continued employment.

Himmelbrand, supra, at 808.

Similarly, the statute in the case at bar guaranteed to petitioner extensive procedural safeguards so as to constitute a property interest in his employment. To characterize the required public hearing as one of "limited purpose" subverts the meaning of *Roth* and has no support in either Massachusetts law or the language of the statute.

In summary, the Court of Appeals has so far misapplied *Fabrizio, supra*, and sanctioned the errors contained therein, *Fabrizio, supra*, in direct conflict with higher Massachusetts and federal authorities, as to require an exercise of this Court's power of supervision.

Conclusion.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 80-1371

ROBERT C. HAGOPIAN,
PLAINTIFF, APPELLEE,

v.

CLAYTON TREFREY, ET AL.,
DEFENDANTS, APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*

John B. Flemming, with whom *Camille F. Sarrouf*, *Anthony Tarricone*, and *Sarrouf, Murray & Daly* were on brief for appellants.
Paul F. Markham, for appellee.

February 3, 1981

Per Curiam. The appellant selectmen appointed appellee Hagopian as town manager in January 1974 "for a term of five years in accordance with Chapter 17 of the Town Charter." Eight months later the Board voted to remove him from office and to suspend him pending final determination of the resolu-

tion. Appellee was notified of the vote and received copies of the Board's resolutions and motions. These materials included the following explanation:

> 1. The Board of Selectmen lack confidence in Robert C. Hagopian as Town Manager.
> 2. The Board of Selectmen believe that Robert C. Hagopian's performance as Town Manager has been unsatisfactory in that he has:
> Failed to demonstrate a clear pattern of leadership for the town as required by Chapter 17.
> Failed to communicate effectively with the Board of Selectmen and with the Town Meeting on matters important to the future of the Town.
> Consistently proven to be uninformed or misinformed on the status of programs such as the two (2) million dollar sewer program currently underway.

The Board granted appellee's request for a public hearing, and adopted a final resolution of removal some time later.

Appellee then brought this 42 U.S.C. § 1983 action seeking damages for the asserted deprivation of his Fourteenth Amendment rights. Specifically he objected to the Board's failure to identify further the grounds for his removal, its failure to allow him to cross-examine Board members under oath at the public hearing, and its decision to dismiss him "without any justifiable cause or basis in fact." The case was tried before a jury, which awarded a $30,000 verdict in his favor.

Initially we determine whether appellee was deprived of a "property" or "liberty" interest in order to establish whether his hearing was constitutionally required. Appellee's claim of "property" in his employment "must be determined by refer-

ence to state law". *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976). Here the relevant state statute is the Saugus town charter, 1947 Mass. Acts ch. 17, §§ 8 & 11.* The significant aspect of the charter, from the standpoint of a property right, is that town managers can be dismissed without cause. Under Massachusetts law a mere requirement that reasons be stated does not mean they must be sufficient to constitute legal cause, or even that they be true. *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. 991, 993, 404 N.E.2d 675, 676-77 (1980). Manifestly this confers no property interest. Requiring a hearing, without the necessity of establishing a cause, stands no higher. "With or without a hearing, there is a record of the cause of removal, and the appeal in either case is to public opinion." *Id.*, quoting *O'Dowd* v. *Boston*, 149 Mass. 443, 447 (1889). *See Bishop* v. *Wood*, 426 U.S. at 345-47. In other

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* "*Section 8. Appointment of Town Manager.* The [S]electmen elected as provided herein shall appoint, as soon as practicable, for a term of five years, a town manager who shall be a person especially fitted by education, training and experience to perform the duties of the office. . . . He may be appointed for successive terms of office . . . .

"*Section 11. Removal of Manager.* The Selectmen, by majority vote of the full membership of the board, may remove the Town Manager. At least thirty days before such proposed removal shall become effective, the Selectmen shall file a preliminary written resolution with the Town Clerk setting forth in detail the specific *reasons* for his proposed removal, a copy of which resolution shall be delivered to the Town Manager. The Manager may reply in writing to the resolution and may request a public hearing. If the Manager so requests, the Board of Selectmen shall hold a public hearing, not earlier than twenty days nor later than thirty days after the filing of such request. After such public hearing, if any, otherwise at the expiration of thirty days following the filing of the preliminary resolution, and after full consideration, the Selectmen by a majority vote of the full membership of the Board may adopt a final resolution of removal. In the preliminary resolution, the Selectmen may suspend the Manager from duty, but shall in any case cause to be paid to him forthwith any unpaid balance of his salary and his salary for the next three calendar months following the filing of the preliminary resolution."

words, we view the statutory notice and hearing requirements as serving two purposes: first, that an articulated and facially invalid reason such as racial discrimination be quickly identified; and second, that employees have an opportunity, should they feel that the reasons proffered were unsupported or not the real reasons, to put their case to the public via a hearing. *See Fabrizio*, Mass. App. Ct. Adv. Sh. at 993 & n.3, 404 N.E.2d at 676-677 & n.3 (1980). In view of the hearing's limited purpose, there is no constitutional right in how it is conducted.

Since the town's contractual notice of employment incorporated the statutory terms, appellee similarly can claim no property entitlement arising from contract, as a matter apart from Massachusetts statutes. Neither does appellee demonstrate an infringement upon a cognizable "liberty" interest, since the Board's charges were not of the "serious and specific" nature that the cases have required. *Ventetuolo* v. *Burke*, 596 F.2d 476, 484 n.13 (1st Cir. 1979). There being neither a property nor a liberty interest at stake here, we need not consider further his contentions that the process he received was inadequate. *See Burns* v. *Sullivan*, 619 F.2d 99, 104 (1st Cir. 1980).

Reversed.

Appendix B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROBERT C. HAGOPIAN,
Plaintiff

v.

CLAYTON W. TREFRY, ET AL.,
Defendants

Filed Feb. 4, 1980
DOCKET NUMBER
75-2617-M

Motion of the Defendants for a Directed Verdict.

The Defendants respectively request the Court to Direct a Verdict for the Defendants on all Counts of the Plaintiff's Complaint.

As reason therefor, the Defendants say that the Plaintiff has not established a prima facie case under 42 U.S.C. § 1983, in that he has not established a deprivation of any constitutionally protected interest in liberty or property. The Court, therefore, lacks subject matter jurisdiction over this controversy.

By Their Attorney,

CAMILLE F. SARROUF, Esquire
SARROUF, MURRAY & DALY
100 Federal Street
Boston, Massachusetts 02110
(617) 482-4303

Feb. 4, 1980. Denied at close of plaintiff's evidence. John J. McNaught, USDJ.

Appendix C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION FILE No. 75-2617-Mc

ROBERT C. HAGOPIAN

vs.

CLAYTON W. TREFRY,
DAVID A. DWYER
BENJAMIN A. MacGLASHIN
CHRISTIE SERINO

Judgment.

This action came on for trial before the Court and a jury, Honorable John J. McNaught, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

that the plaintiff Robert C. Hagopian recover of the defendants Clayton W. Trefry, David A. Dwyer, Benjamin A. MacGlashin and Christie Serino the sum of $25,000.00, with interest thereon at the rate of 8% per cent as provided by law, and his costs of action.

It is further Ordered

that the plaintiff Robert C. Hagopian recover of the defendant Clayton W. Trefry the sum of $2,000.00, with interest thereon at the rate of 8% as provided by law and his costs of action

that the plaintiff Robert C. Hagopian recover of the defendant David A. Dwyer the sum of $1,000.00, with interest thereon at the rate of 8% as provided by law and his costs of action

that the plaintiff Robert C. Hagopian recover of the defendant Benjamin A. MacGlashin the sum of $1,000.00, with interest thereon at the rate of 8% as provided by law and his costs of action

that the plaintiff Robert C. Hagopian recover of the defendant Christie Serino the sum of $1,000.00, with interest thereon at the rate of 8% as provided by law and his costs of action.

Dated at Boston, Massachusetts, this 29th day of April, 1980.

/s/. . . . . .

Karl W. Fagan
Deputy Clerk of Court

Appendix D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT C. HAGOPIAN,
vs.
CLAYTON W. TREFRY
DAVID A. DWYER
BENJAMIN A. MacGLASHIN
CHRISTIE SERINO

CIVIL ACTION No.
75-2617-Mc

ORDER

McNAUGHT, J., DISTRICT JUDGE

After hearing on Defendants' Motion for Judgment Notwithstanding the Verdict Or In The Alternative, For A New Trial,

It is hereby ORDERED, motion DENIED.

By the Court,

/s/ _____
Elizabeth S. Murray
Deputy Clerk

Dated at Boston, Massachusetts
May 5, 1980

Appendix E.

United States Court of Appeals
For the First Circuit

No. 80-1371.

ROBERT C. HAGOPIAN,
PLAINTIFF, APPELLEE,
v.
CLAYTON W. TREFREY, ET AL.,
DEFENDANTS, APPELLANTS,

JUDGMENT

Entered: February 3, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The verdict of the jury is set aside, and the judgment of the District Court is reversed.

Costs in favor of appellant are taxed at $1,132.59.

Certified and issued is informal mandate under F.R.A.P. 41 on March 30, 1981.

/s/_____
Dana H. Gallup
Clerk.

By the Court:
/s/_____
Dana H. Gallup,
Clerk.

By: /s/_____
Frank P. Scigliano
Chief Deputy Clerk.

Appendix F.

United States Court of Appeals
For the First Circuit

No. 80-1371

ROBERT C. HAGOPIAN,
PLAINTIFF, APPELLEE,
v.
CLAYTON TREFREY, ET AL.,
DEFENDANTS, APPELLANTS.

MEMORANDUM AND ORDER ON
PETITION FOR REHEARING
Entered: March 23, 1981

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Petitioner argues the irrelevancy of *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. 991, 404 N.E.2d 675 (1980), by pointing out that in the case at bar a hearing is required, if requested, before removal. Such an observation would have force only if it could be said that the requirement of a hearing implied a requirement of reasonable or just cause. Petitioner's authorities do not fill this gap. *Ayers* v. *Hatch*, 175 Mass. 489 (1900), deals with a statute specifically conditioning removal on "cause", albeit cause as deemed sufficient by the removing authority; the statement of cause upheld was "the good of the service", not demonstrably different from the statements in

this case concerning lack of confidence, unsatisfactory performance, and absence of a clear pattern of leadership.

McKenna v. *White*, 287 Mass. 495, 498 (1934), provides specific support of the reasoning in *Fabrizio* in saying:

> "The manifest purpose of the provision that a removal from an appointive office be accompanied by written statement of the reason or reasons therefor signed by the removing officer or officers to be filed with the public records of the city is to impose the restraint upon unwarranted, prejudiced or wrongful removals naturally flowing from immediate, complete and permanent publicity of the true grounds and motives underlying that action, and to enable the removed officer or employee to know why he has been deemed unworthy to continue longer in the public service." 287 Mass. at 498, 192 N.E. at 85.

The petition is denied.

By the Court,

/s/_____

Dana H. Gallup
Clerk.

Appendix G.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT C. HAGOPIAN	CIVIL ACTION
v.	75-2617-Mc
CLAYTON W. TREFRY, ET. AL.	DOCKETED

JUDGMENT OF DISMISSAL

April 2, 1981

McNAUGHT, District Judge

Pursuant to the "MANDATE" of the United States Court of Appeals for the First Circuit filed March 30, 1981, in that "The verdict of the jury is set aside, and the judgment of the District Court is reversed"

It is hereby ORDERED that the complaint is dismissed with costs.

By the Court,

/s/_____

Karl W. Fagan
Deputy Clerk

No. 80-2176.

Office-Supreme Court, U.S.
FILED
JUL 22 1981
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT C. HAGOPIAN,
PETITIONER,

v.

CLAYTON W. TREFRY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I

Questions Presented

1. Whether the Court of Appeals for the First Circuit correctly determined that the petitioner did not possess a property interest in continued employment as Town Manager that was protected by the due process of the Fourteenth Amendment.

2. Whether this Court ought to grant certiorari to review a case which primarily involves the interpretation of Massachusetts State Law and which presents no conflict either with decisions of other Circuit Courts or with prior decisions of this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2176.

ROBERT C. HAGOPIAN,
PETITIONER,

v.

CLAYTON W. TREFRY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondents are not dissatisfied with the petitioner's statement of jurisdiction and citation to opinion below.

Statement of the Case

On January 21, 1974, the respondents, acting in their capacity as Selectmen of the Town of Saugus, appointed petitioner as Town Manager. Pursuant to the Town Charter, Mass. St. 1947, Ch. 17, §8, the appointment was for a term of five (5) years subject to removal as provided in said Chapter 17, Section 11.

Subsequently, the Board of Selectmen (hereinafter referred to as "the Board") became dissatisfied with petitioner's performance as Town Manager. Acting in accordance with the Town Charter, a majority of the Board adopted a preliminary resolution on September 27, 1974 to remove petitioner from office. The Board set forth the following reasons for its action:

1. The Board of Selectmen lack confidence in Robert C. Hagopian as Town Manager.
2. The Board of Selectmen believe that Robert C. Hagopian's performance as Town Manager has been unsatisfactory in that he has:

   failed to demonstrate a clear pattern of leadership for the Town as required by Chapter 17;

   failed to communicate effectively with the Board of Selectmen and with the Town Meeting on matters important to the future of the Town;

   consistently proven to be uninformed or misinformed on the status of programs such as the Two Million ($2,000,000.00) Dollar sewer program currently under way.

The plaintiff was notified of the Board's action and received copies of the resolution.

At petitioner's request, the Board agreed to hold a public hearing on the resolution on November 1, 1974. Prior to the hearing, petitioner was informed that the Board would adopt the procedural rules that had been established at the only other such hearing held under the Town Charter. The rules included the following:

1. The petitioner could present any statement, oral or written, that he desired;
2. The petitioner could present any witnesses he desired;

3. The petitioner could be represented by counsel;
4. No time limitation would be imposed upon statements or arguments presented by petitioner or his counsel; and
5. Any registered voter of the Town of Saugus would be allowed to speak.

At the hearing, the petitioner demanded that the Board of Selectmen be sworn so that he could cross-examine them under oath. When the Board, acting on the advice of Town Counsel, declined to be sworn, petitioner refused to participate in the public hearing, and in fact, left the meeting. The hearing was conducted in petitioner's absence, with numerous registered voters of the Town expressing their views, pro and con, on the merits of the proposed removal of petitioner from office. After all persons in attendance had an opportunity to speak, the hearing was closed.

On November 12, 1974, the Board adopted a final resolution of removal. At all times, the Board acted pursuant to and in accordance with the provisions of Section 11 of the Town Charter.

Petitioner then commenced this Civil Rights Action pursuant to Section 1983 of Title 42 of the United States Code, alleging that the respondents violated his Fourteenth Amendment right to due process in dismissing him from employment as the Town Manager. Respondents moved to dismiss, contending, *inter alia*, that the petitioner did not possess a property interest in continued employment that was protected by the Fourteenth Amendment. The Motion was denied by the Court, (Murray, D.C.J.) without opinion.

The action was subsequently tried before a jury, McNaught, D.C.J. presiding. At the close of petitioner's case, respondents moved for a directed verdict, again contending that under Massachusetts law the petitioner was an employee at will, and therefore did not have a property interest in continued

employment. The motion was denied and the issue of whether a property interest existed was submitted to the jury, which returned a verdict for petitioner against all respondents.

Upon appeal to the United States Court of Appeals for the First Circuit, the judgment in the lower court was reversed. The Court, in a per curiam opinion, emphasized that the key aspect of the Town Charter was that a Town Manager could be dismissed without cause. The Court further noted that under Massachusetts law, the Charter's requirement of a statement of reasons did not mean that the reasons must be sufficient to constitute legal cause, or even that they be true. Thus, the Court concluded that the Charter conferred no property interest upon the petitioner.

Reasons for Denying the Writ

I. The Court of Appeals Correctly Determined That the Petitioner Was Not Deprived of a Property Interest in Continued Employment as Town Manager of the Town of Saugus.

Petitioner submits that the First Circuit correctly interpreted both Massachusetts and federal law in dismissing petitioner's complaint. It is well settled that the nature of an individual's claim of entitlement to a specific benefit must be determined, in the first instance, by reference to state law. *Bishop* v. *Wood*, 426 U.S. 341, 344 (1978).[1]

[1] Petitioner contends that this court should accord deference to the two District Court judges in this case who have previously determined that the petitioner had a constitutionally-protected interest under the provisions of the Saugus Town Charter. Petitioner's argument is misleading and inaccurate. As previously noted, the District Court judge who denied the respondents' Motion to Dismiss did so without issuing an opinion. Thus, it is simply impossible to determine the basis for the court's ruling on that Motion.

In addition, the presiding judge at trial at no time made a ruling that petitioner had a constitutionally-protected interest. Rather, the trial court's

The Massachusetts law which applies to the present case is the Town Charter of the Town of Saugus, Mass. St. 1947, Ch. 17. The Charter provides that the Board of Selectmen may at any time remove the Town Manager by mere majority vote. There is absolutely no mention of any restriction upon the grounds for removal. The only qualification upon the removal authority of the Board is that the Board must take the following steps to effectuate the termination of the Town Manager:

1. Adopt a preliminary resolution setting forth the specific reasons for removal.
2. Deliver a copy of the resolution to the Town Manager.
3. Conduct a public meeting upon the request of the Town Manager.
4. After the public hearing, adopt a final resolution of removal.

The statute neither specifies nor limits the grounds upon which removal may be predicated. The clear and unambiguous meaning of the statute is that the Town Manager serves at the will and pleasure of the Board, and therefore has no valid claim of entitlement to continued employment.

Massachusetts case law further supports this interpretation of the statute. In *O'Dowd* v. *Boston*, 149 Mass. 443, 446-447, 21 N.E. 949, 950 (1889), the Supreme Judicial Court interpreted a statute which authorized public officials to remove

---

position was that the issue of whether the petitioner had a reasonable expectation of continued employment presented a question of fact for the jury.

Thus, neither of the lower court judges involved in this action ever expressed an opinion on the precise issue decided by the Court of Appeals. Indeed, throughout this action, the respondents have contended that the question of petitioner's entitlement to continued employment presented a question of law to be decided by the court with reference to Massachusetts law and was not an issue to be submitted to a jury. The Court of Appeals ruled that as a matter of law, under Massachusetts decisions, petitioner had no constitutionally-protected property interest in his employment as Town Manager.

employees "for such causes they may deem sufficient and shall assign in their order for removal" as simply qualifying a removal at pleasure by requiring a record to be made of the cause. The Court held that no hearing was required under the statute because *"[w]ith or without a hearing, . . . the appeal in either case is to public opinion."* *Id.* at 447, 21 N.E. at 950. Thus, even though the statute contained the term "cause", the Court ruled that it did not grant an employee any right to continued employment.

In *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. (1980) 991, 404 N.E. 2d 675, the Massachusetts Appeals Court interpreted a statute virtually identical to the provisions of the Saugus Town Charter. In *Fabrizio*, the Mayor of Quincy could remove the head of a department or member of a board by "filing a written statement with the City Clerk setting forth in detail the specific reasons therefore." *Id.* at 992, 404 N.E. 2d at 676 *citing* M.G.L. c. 43, §54. Again, the Court noted that such a statute simply qualifies a removal at pleasure by requiring a record to be made of the cause, thereby preventing removals for unlawful or frivolous reasons, such as on the basis of race, religion or sex. *Fabrizio* v. *City of Quincy*, *supra* at 992, 993 n.3, 404 N.E. 2d at 677. But most importantly, the Court noted that a discharged employee *"would not be entitled to restoration to his position* if he should succeed in proving that the reasons were in fact untrue." *Id.* at 993, 404 N.E. 2d at 677 (emphasis supplied).

Petitioner cites a number of Massachusetts decisions in support of his contention that the Court of Appeals both misapplied the *Fabrizio* decision and also sanctioned the errors contained in that opinion. The cases relied upon by petitioner, however, are completely consistent with the decision of the Court of Appeals.

First, the petitioner argues that the decision in *McKenna* v. *White*, 287 Mass. 495, 192 N.E. 84 (1934) stands for the proposition that when a removal statute requires a statement of

reasons, it also requires that the reasons be true. This argument is clearly incorrect. Although the *McKenna* decision does require that the removing authority state the actual grounds and motives underlying its action, the court never held or even suggested that the grounds relied upon by the appointing authority must be in fact correct. Nor did the court state that the employee would be entitled to reinstatement to his position upon proof of the falsity of the grounds. Rather, the *McKenna* decision is completely consistent with *Fabrizio* v. *Quincy*, *supra*, in that it merely imposes a restraint upon removals for facially unlawful reasons by requiring immediate and complete publicity of the reasons underlying the action. *McKenna* v. *White*, *supra* at 498, 192 N.E. at 85.

Petitioner also contends the case of *McCarthy* v. *Emerson*, 202 Mass. 352, 88 N.E. 668 (1909) supports his argument that he had a Constitutional right in how the hearing required by the town Charter was conducted. The *McCarthy* decision, however, involved a civil service statute which authorized removals only for "just cause" and for reasons given specifically in writing and which also required a public hearing at which the employee could answer the charges preferred against him. *Id.* at 353, 88 N.E. at 669. Petitioner's reference to the similarity of this statute to the removal provisions of the Saugus Town Charter simply underscores his consistent refusal to recognize that it is the employee's entitlement to continued employment which determines whether a hearing is constitutionally required and if so, what form of hearing is necessary; the mere provision of a statutory right to a public hearing does not in itself create a right to continued employment absent cause for dismissal.

Thus, under Massachusetts Law, it is clear that a removal statute that requires only a statement of the reasons for dismissal simply qualifies a removal at pleasure by requiring a record to be made of the basis for the action. The only protection accorded an employee by such statutes is the right not to

be removed for a reason or cause which, on its face, is unlawful or unconstitutional. *McKenna* v. *White*, 287 Mass. 495, 498, 192 N.E. 84, 85 (1934); *Ayers* v. *Hatch*, 175 Mass. 489, 492, 56 N.E. 612, 613 (1900); *O'Dowd* v. *Boston*, 149 Mass. 443, 447, 21 N.E. 949, 951 (1889); *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. (1980) 991, 993 and n.3, 404 N.E. 2d 675, 676-677 and n.3. Most importantly, with or without a hearing, the employee's only appeal is to public opinion. *Fabrizio* v. *City of Quincy, supra* at 993, 404 N.E. 2d at 676-77 *quoting O'Dowd* v. *Boston, supra* at 447, 21 N.E. at 951.

Accordingly, the Court of Appeals correctly determined that under Massachusetts Law, a petitioner had no legitimate claim of entitlement to continued employment as Town Manager for the Town of Saugus. The notice and hearing requirements of the Town Charter serve two quite limited purposes:

1. To allow redress for facially invalid reasons such as racial discrimination; and
2. To allow employees to put their case to the public via a public hearing.

The Charter did not impose any substantive restriction upon the removal authority of the Board; petitioner could be dismissed without cause. The Court of Appeals therefore applied prior decisions of this court and ruled that because petitioner had no claim of entitlement to continued employment as Town Manager, he did not possess a property interest protected by the Fourteenth Amendment. *Bishop* v. *Wood*, 426 U.S. 341, 345 n.8, 346 (1978); *Board of Regents* v. *Roth*, 408 U.S. 564, 578 (1972).

II. The Petitioner Has Shown No Conflicts In Judicial Decisions Which Would Justify A Grant Of Certiorari.

Rule 17 of this Court states that review on a writ of certiorari is a matter of sound judicial discretion and will be granted only where there are special and important reasons for the Court's exercise of this jurisdiction. Respondent respectfully submits that the instant case is inappropriate for such review because petitioner has failed to show that the decision of the Court of Appeals:

1) conflicts with the decision of another Court of Appeals on the same matter; or
2) decides an important state question in a way in conflict with applicable state law; or
3) decides a federal question in a way in conflict with applicable decisions of this Court.

Petitioner has not cited a single decision of another Federal Circuit Court which conflicts with the decision in the instant case. Furthermore, the decision of the Court of Appeals is entirely consistent with prior Supreme Court decisions.

The court appropriately determined the nature of the alleged property interest involved by referring to Massachusetts Law. *Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 82 (1978); *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976). The court next applied the appropriate federal standard, namely, whether the petitioner had a legitimate claim of entitlement to continued employment. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Finally, consistent with the decision of this Court in *Bishop* v. *Wood*, *supra* at 345, n.8 346, the court concluded that petitioner had no property interest in continued employment because he could be fired without cause. The decision of the Court of Appeals was both consistent with and indeed mandated by, prior decisions of this court.

The only ground that even arguably could warrant the granting of certiorari in this case is that the decision of the Court of Appeals conflicts with applicable state law. Petitioner has argued that the Court of Appeals both misapplied Massachusetts Law and sanctioned errors contained in prior Massachusetts decisions. A careful examination of petitioner's argument, however, reveals that his primary contention is that the decision of the Massachusetts Appeals Court in *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. 991, 404 N.E. 2d 675 (1980) is incorrect. Yet petitioner fails to cite a single Massachusetts decision which supports his contention that the mere existence of certain procedural protection such as the requirements of notice and a public hearing, provides a basis for implying that a removal must be based on cause. In effect, the petitioner is asking this Court to overrule the most recent decision of a Massachusetts Appellate Court on the issues involved in the present case, and further to create a principle of Massachusetts Law for which there is little, if any, precedent in that jurisdiction.

Thus, although the petitioner has attempted to couch his contentions on appeal in terms that implicate the decision of the Court of Appeals, his primary argument concerns the soundness of a decision of a Massachusetts Appellate Court. Under these circumstances, the respondents submit that the instant case is particularly inappropriate for review on a writ of certiorari.

Conclusion

For the reasons set forth in the foregoing discussion, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

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